

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

CIVIL NO. 1:05CV209
(1:01CR52-6)

VENTURA GARCIA,

Petitioner,

Vs.

UNITED STATES OF AMERICA,

Respondent.

ORDER OF DISMISSAL

THIS MATTER is before the Court on the Petitioner's motion to vacate, set aside, or correct judgment pursuant to 28 U.S.C. § 2255. Because the Court determines this is a successive petition and it has no jurisdiction to consider same, it is dismissed.

I. PROCEDURAL HISTORY

On February 8, 2005, the Petitioner, through counsel, filed a motion pursuant to § 2255 seeking to correct his sentence based upon the Supreme Court's rulings in *United States v. Booker*, 125 S. Ct. 738 (2005). Because the petition raised only this one issue and the Petitioner would have had until October 4, 2005, to file a § 2255, the Court inquired of counsel if he in fact had obtained the Petitioner's permission to file the motion. *See, Order, Garcia v. United States*, Civil No. 1:05CV30, filed February 16, 2005, at 2.¹ By Statement of Counsel filed February

¹The Court also advised the Petitioner and counsel that the Supreme Court's decision in *Booker* was not retroactive to cases on collateral review. *See, Order, supra*, at 1 (collecting

24, 2005, the attorney advised the Court that the Petitioner had contacted him about the possibility of a reduction in his sentence pursuant to *Booker* and gave counsel permission to file the § 2255 motion on his behalf. **See, Order in Civil No. 1:05CV30, filed February 24, 2005.** The Court then dismissed the motion and placed the Petitioner on notice “that no future petitions pursuant to 28 U.S.C. § 2255 may be filed without permission of the United States Court of Appeals for the Fourth Circuit.” **Judgment in Civil No. 1:05CV30, filed February 24, 2005.**

II. DISCUSSION

As amended by the AEDPA [Antiterrorism and Effective Death Penalty Act], § 2255 bars successive applications unless they contain claims relying on

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

...

In addition to enacting the substantive standards we have just described, the AEDPA modified the procedures governing successive collateral review applications. As a result of these modifications, a prisoner seeking to file a successive application in the district court must first obtain authorization from the appropriate court of appeals.

...

In the absence of pre-filing authorization, the district court lacks jurisdiction to consider an application containing abusive or repetitive claims.

United States v. Winestock, 340 F.3d 200, 204-05 (4th Cir. 2003). “The ultimate question here is whether [Petitioner’s] motion for [relief] should [be] treated as a successive collateral review application.” *Id.*, at 203.

cases).

As previously noted, the Petitioner has already filed one motion pursuant to § 2255. The undersigned has no jurisdiction to entertain a second one unless it has been certified “by a panel of the appropriate court of appeals[.]” **28 U.S.C. § 2255**. Thus, if this motion is a successive petition, it must be presented in the first instance to the Fourth Circuit. *Winestock, supra*, at **205**. As a result, the undersigned has no jurisdiction to entertain any of the claims presented.

III. ORDER

IT IS, THEREFORE, ORDERED that the Petitioner’s motion is a successive motion pursuant to 28 U.S.C. § 2255 and is hereby **DISMISSED** for lack of jurisdiction.

Signed: June 8, 2005

A handwritten signature in black ink, appearing to read 'Lacy H. Thornburg', written over a horizontal line.

Lacy H. Thornburg
United States District Judge

